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McGirt Policy Briefs: Regulation of the Environment and Natural Resources

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McGirt *Policy Briefs*

Regulation of the Environment and Natural Resources

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McGirt *and the Work of Rebuilding of Tribal Nations: A Tribal Nation Building Colloquium*

A Collaboration Between the HPAIED and NNC

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Introduction and Overview

On July 9, 2020, the United States Supreme Court issued its decision in *McGirt v. Oklahoma*. Although the only actual effect of that decision was on Mr. McGirt's state court criminal conviction, rendering it invalid in light of the continuing existence of the Muscogee (Creek) Nation's reservation, the implications of *McGirt* reverberated throughout Oklahoma and the nation. By rejecting Oklahoma's arguments that the march to statehood had resulted in the implicit disestablishment of the Creek's reservation (and, by analogy, those of the neighboring and similarly situated Cherokee, Chickasaw, Choctaw, and Seminole Nations), Justice Gorsuch's opinion on behalf of the Court's majority reaffirmed that nearly all of eastern Oklahoma remains Indian Country. The governments of those Five Tribes now face the practical challenges posed by reclaiming territorial sovereignty mostly denied to them for over a century.

That work of rebuilding tribal sovereignty poses much difficulty and significant opportunities. This project, McGirt *and the Work of Rebuilding of Tribal Nations: A Tribal Nation Building Colloquium*, is focused on assisting tribal governments and others in assessing and tackling those challenges. The Colloquium's thesis best describes this objective:

> …*McGirt* carr[ies] challenging implications [including] the potential for important expansions of tribal powers – across broad swaths of tribal governmental responsibilities. At the same time, a number of non-tribal governments are sounding alarms that threaten heightened hostility to tribal sovereignty. Ample evidence exists to drive home the point that hostility between Tribal governments and their non-Tribal counterparts seldom serves the interests of either of their respective citizenry. It will be critical for Tribal leaders and non-tribal political actors to approach the exercise of Tribal powers in the post-McGirt era with wisdom and vision founded on facts, evidence, and sound legal principles.

Therefore, through a series of briefing papers on a variety of topics, the Colloquium aims to provide "theoretically sound and fact-grounded examples and lessons that can help to separate the prose from the poetry of Tribal sovereignty and governance." This briefing paper does so in the context of environmental regulation and natural resources.

Environmental regulation and the management of natural resources presents a number and range of complex legal and policy issues for tribal and non-tribal decision-makers. This briefing paper aims to assist those facing the thicket of these issues in eastern Oklahoma by briefly reviewing the relevant legal framework and

then focusing on environmental regulation in the context of oil and gas development, natural resource management in the context of hunting and fishing, and water rights and the management of water. For each of these issues, the paper provides the more specific legal framework, assesses risks and opportunities post-*McGirt*, and offers relevant examples and lessons.

Relevant Legal Principles and Background

Despite its narrow focus criminal jurisdiction, *McGirt* was never just about Mr. McGirt's conviction. Both the State of Oklahoma and a number of *amici* urged the Supreme Court to consider the potential practical consequences of recognizing the Creek Nation's reservation boundaries. These included the specter of a number of wide-ranging civil and regulatory impacts, including the possibility that such a decision could "authorize greater, and potentially exclusive, tribal and federal regulation over lands, businesses, and energy resource development."[1]

The Supreme Court rejected these alleged practical consequences and instead applied its long-standing precedent requiring express Congress language to disestablish a reservation.[2] In doing so, the Court dismissed concerns over civil and regulatory jurisdiction as misplaced and not before the Court but noted that it was proceeding "well aware of the potential for cost and conflict around [those] jurisdictional boundaries, especially ones that have gone unappreciated for so long."[3]

In the context of regulation over lands, environmental protection, and natural resources, both the Five Tribes and the State of Oklahoma, as well as their citizens and local communities, are facing the "potential for [those] cost[s] and conflict[s] around jurisdictional boundaries." To support their efforts to avoid or minimize that potential, this paper begins with a brief overview of the relevant jurisdictional boundaries.

A. Shifting Jurisdictional Boundaries

The upshot of *McGirt* is that the reservations of the Five Tribes, which were established and guaranteed by their treaties with the United States, remain extant. The legal import of that decision is rooted in federal law, which defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[4] Therefore, in determining that the Creek Reservation (and those similarly situated) was not

[1] Brief of *Amicus Curiae* Envtl. Fed. of Oklahoma, Inc. et al., *McGirt v. Oklahoma*, Case No. 18-9526, 2 (filed on March 20, 2020).
[2] *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.")
[3] *McGirt*, 140 S. Ct. at 2481.
[4] 18 U.S.C. § 1151 (2016).

diminished or disestablished, the Supreme Court confirmed that all land within the reservation's boundaries, regardless of ownership, is Indian Country and, as such, subject to unique jurisdictional rules, like the Major Crimes Act at issue in *McGirt*.

Reservation boundaries and the limits of Indian Country have important consequences for civil and regulatory authority as well. Historically, the Supreme Court recognized that tribal territories encompassed distinct political communities, with which the United States entered treaty relations and thereby assumed important obligations to the exclusion of state interests or authority.[5] This general concept, rooted in the government-to-government relationship expressed through treaties, is foundational to federal Indian law and remains relevant for understanding the continuing prohibition of state power over tribes and tribal members within reservations.[6]

Over time, however, the bright line rule that states have no power or role in Indian Country has shifted when it comes to state authority over non-tribal members. During the allotment era of the late 1800s and early 1900s, for example, the United States opened reservation lands to settlement and purchase by non-tribal members and, as a result, many previously intact reservations became "checkerboarded" with different types of land ownership. As a result, the Supreme Court's reliance on its early conception of tribal authority has evolved.

Primarily, this evolution has led the Court to analyze assertions of state authority over non-tribal members in Indian Country within the context of preemption rather than simply ask whether such authority would infringe upon tribal sovereignty.[7] This preemption analysis relies upon a judicial balancing of competing federal, tribal, and state interests, analysis of relevant federal treaties or laws, and moves consideration of tribal sovereignty as a backdrop against which to conduct that assessment.[8] Where such a review determines that federal and tribal interests outweigh the state's interest in asserting authority, that state power is preempted.[9] In other instances, however, the Supreme Court has relied on the significance of state interests, services, and activities to uphold incursions of state power over non-tribal members in Indian Country.[10]

In addition, the history of allotment has profoundly impacted the Supreme Court's analysis of tribal regulatory authority in Indian Country. Beginning with *Montana v. United States*, a case in which the Crow Tribe sought to prohibit non-Indians from fishing and hunting on non-Indian owned lands within the Tribe's reservation, Court

[5] Worcester v. Georgia, 31 U.S. 515, 561 (1832)
[6] *See*, *e.g.*, McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 168 (1973); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 (1987).
[7] *See*, *e.g.*, McClanahan, 411 U.S. at 171 (noting that "the [Indian sovereignty] doctrine has undergone considerable evolution in response to changed circumstances").
[8] *See*, *e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).
[9] *See*, *e.g.*, *Id.*; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
[10] *See*, *e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185-87 (1989).

drastically shifted the jurisdictional analysis from consideration of the reservation's exterior boundaries to assessment of individual parcels of land.[11] There, relying on its own review of the allotment era's policy goals, the Court directly linked the process of allotment to limitations on tribal regulatory authority, saying that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."[12]

Nonetheless, the *Montana* Court recognized that some tribal authority over non-tribal members extends across all lands within Indian Country. Although generally not the case, the Court cautioned that, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[13] The Court defined these instances as follows:

> [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements[; and]
>
> [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[14]

This conception of tribal regulatory authority has evolved into a "pathmarking" establishment of the general "*Montana* rule" limiting tribal authority and the "*Montana* exceptions" recognizing such powers.[15] Despite the *Montana* Court's certainty that tribes retain certain powers over non-Indians, even on non-Indian owned fee land, the Court's reliance on this test has resulted in recognizing such authority in only one very limited capacity in the intervening four decades.[16]

Thus, while far removed for foundational notions of tribal territories as distinct communities over which a state could have no authority, the intertwined questions of whether a state (analyzed under a preemption analysis) or a tribe (analyzed under

[11] 450 U.S. 544 (1981).
[12] *Id.* at 559 n. 9.
[13] *Id.* at 565.
[14] *Id.* at 565-66 (citations omitted).
[15] *See*, *e.g.*, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 329-30 (2008); Nevada v. Hicks, 553 U.S. 353, 358-59 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 445-48 (1997); *see also* McGirt, 140 S. Ct. at 2502 (Roberts, C.J. dissenting).
[16] Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

Montana and its progeny) can exercise particular powers have evolved into complicated, fact-specific legal questions.

B. Other Sources of Tribal Authority

In addition to the evolution of Supreme Court precedent regarding state and tribal regulatory authority, Congress remains free to define the nature and extent of tribal and state power in Indian Country.

First, Congress retains authority to both recognize tribal sovereignty and delegate to tribes additional authority under federal law.[17] It has done both through amendments to a suite of bedrock environmental laws by authorizing tribes to assume primacy across their reservations for purposes of implementing and enforcing those laws.[18] Importantly, after Congress did so in changes to the Clean Water Act (CWA), the United States Environmental Protection Agency (USEPA) initially interpreted that action as a recognition of tribal sovereignty and required tribes to demonstrate inherent authority (pursuant to *Montana*) in order to exercise those powers.[19] For a variety of reasons, however, the USEPA has subsequently reinterpreted the CWA as a delegation of federal power, which obviates the need for any *Montana* analysis.[20]

Second, although the Supreme Court has narrowly interpreted the rights reserved by tribes through treaties with the United States when considering the effects of allotment and applying *Montana*, those reserved rights remain important bases for tribal activities and powers. The Supreme Court applies particular rules, known as the Indian canons of construction, when interpreting treaty reserved rights and, as the Court found in *McGirt*, these rules require that such rights be insulated from diminishment unless Congress has expressly indicated an intent to do so.[21] In addition to *McGirt*, a spate of recent cases upholding the continuing existence and exercise of these reserved rights beyond reservation boundaries suggests that the modern Court is committed to adhering to the canons of construction when analyzing treaty rights and authorities going forward.[22]

Third, for over a century, the Supreme Court has recognized and protected tribal rights to water appurtenant to and necessary to fulfill the purposes of their reservations. These rights, first determined by the Court in its 1908 decision *United*

[17] *See*, *e.g.*, United States v. Lara. 541 U.S. 193 (2004).
[18] *See Tribal Assumption of Federal Laws – Treatment as a State (TAS)*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas (last visited Dec. 1, 2010).
[19] *See*, *e.g.*, State of Montana v. United States Envt'l Protection Agency, 137 F.3d 1135 (9th Cir. 1998).
[20] Environmental Protection Agency, *Revised Interpretation of Clean Water Act Tribal Provision*, 81 Fed. Reg. 30,183 (May 16, 2016).
[21] *See*, *e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).
[22] *See*, *e.g.*, Washington State Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019); Herrera v. Wyoming, 139 S.Ct. 1686 (2019).

States v. Winters,[23] establish a federal law basis for tribal claims to water. Furthermore, although subsequent federal law subjects those claims to adjudication by state courts,[24] their origin in the Congressional acts and treaties setting aside tribal homelands often ensure they remain senior to claims by competing water users. Finally, by virtue of their federal status, these rights need not comply with state law in all respects.[25] As a result, the unique status of tribal water rights provide an additional source of tribal power that often requires additional analysis beyond the general assessment of jurisdictional boundaries described above.

C. Oklahoma

The preceding overview of federal Indian law is necessary to understand the general framework within which issues specific to eastern Oklahoma arise. The unique history of the Five Tribes and various aspects of their relations with both the United States and the State of Oklahoma are also critical to assessing the challenges and opportunities posed by *McGirt* in the areas of environmental regulation and natural resources. While a detailed historical review is beyond the scope of this paper,[26] the following examples, rooted in treaties and federal laws specific to the Five Tribes and Oklahoma, are particularly relevant and demonstrate the need to carefully analyze these unique contexts when considering otherwise applicable principles of federal Indian law.

As recognized by Justice Gorsuch's opinion for the majority in *McGirt*, the present-day jurisdictional conflicts are rooted in the evolution of law and policy developed by and foisted upon the Five Tribes. Particularly relevant to the *McGirt* decision, for example, were treaties entered between the United States and the Creek Nation in the early 1830s, pursuant to which the United States secured the removal of the Nation in exchange for a "'permanent home to the whole Creek nation," … [and a] promise[ ] that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.'"[27] Similar guarantees or promises of land were made to the other four of the Five Tribes.[28]

As with the question of criminal jurisdiction posed in *McGirt*, the terms of these and subsequent treaties reserving and protecting lands and reservations for the Five

[23] 207 U.S. 564 (1908)
[24] 43 U.S.C. § 666 (2016).
[25] *See*, *e.g.*, United States v. Adair, 723 F.2d 1324, 1410-11 (9th Cir. 1983).
[26] Most readers are likely intimately familiar with this history; however, for additional background and resources, *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §4.07[1][a] at 288-310 (Nell Jessup Newton, ed. 2012) [hereinafter COHEN'S HANDBOOK].
[27] 140 S. Ct. at 2459 (citing Treaty with the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty); Treaty with the Creeks, Art. XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty)).
[28] *See*, *e.g.*, Treaty with the Cherokees, art. V, Dec. 29, 1835, 7 Stat. 478, 481; Treaty with the Choctaws, art. 4, Sept. 27, 1830, 7 Stat. 333, 333-34; Treaty with the Seminoles, March 28, 1833, 7 Stat. 423; Treaty with the Chickasaws, Oct. 20, 1832, 7 Stat. 381.

Tribes have been critical in resolving disputes over ownership of and jurisdiction over natural resources. In *Choctaw Nation v. Oklahoma*, for example, the United States Supreme Court relied on these treaty promises to the Cherokee, Choctaw, and Chickasaw to find that the bed and banks of certain navigable waterways passing through those lands—property that would have otherwise passed to the State of Oklahoma upon statehood—was granted to and remained in tribal ownership.[29] That result, rooted in these specific treaties, was starkly different than the Court's decision in *Montana* that similar property had not been reserved by the Crow Tribe and, instead, had transferred to the State of Montana upon statehood.[30] Thus, while the general principles of federal Indian law may be relevant, tribal-specific histories and treaty language are also critical to any legal issue arising in Indian Country.

The history of allotment in what would become Oklahoma is also important to understanding and analyzing the post-*McGirt* landscape. The federal government pursued allotment of the Five Tribes' territories in a manner consistent with the general allotment policy prescribed by the General Allotment Act of 1887 but, unlike other reservations across much of the country, the territories of the Five Tribes were excluded from that law.[31] Instead, Congress passed additional legislation specific to the allotment of these tribal lands, including the Curtis Act in 1898, which authorized allotment generally,[32] and subsequent tribe-specific implementing legislation.[33] Ultimately, while the Five Tribes and their members have fought to retain individual allotments, tribal trust lands, and other parcels owned in restricted fee status, the allotment of their lands resulted in a significant diminution of tribal- and tribal member-owned lands within their reservations.[34] The resulting patterns of ownership within the reservations of the Five Tribes include lands retained by the Tribes since their original treaty guarantees,[35] lands allotted to individual tribal members that, whether formally restricted or not, remain owned by the heirs of the

[29] 397 U.S. 620, 628-31 (1970).

[30] *Montana*, 450 U.S. at 555 n. 5 (distinguishing the history of removal of the Five Tribes and the grants of property to them in fee status from the relevant Crow treaties and history).

[31] Act of Feb. 8, 1887, § 8, 24 Stat. 391, codified at 25 U.S.C. §339 (2016).

[32] Act of June 28, 1898, § 11, 30 Stat. 495, 497; *see also* McGirt, 140 S. Ct. at 2465 (discussing the Curtis Act in the context of jurisdiction).

[33] *See*, *e.g.*, An Act to Ratify and Confirm an Agreement with the Muscogee or Creek tribe of Indians and for other purposes, March 1, 1901, 31 Stat. 861, 862-64.

[34] Five Civilized Tribes Allotted Lands, Cherokee Nation GIS doc. no. 4551c (Mar. 1, 2016). Copy available in author's files. Importantly, the trust and restricted fee lands retained or acquired by the Five Tribes within reservation boundaries remained Indian Country pursuant to federal law regardless of the *McGirt* decision and recent decisions have recognized the same for individually owned trust or restricted fee allotments. COHEN'S HANDBOOK, §4.07[1][b] at 292-94. Thus, the fundamental challenge and possibility posed by *McGirt* is the recognition that all of those lands lost through allotment remain Indian Country and are now subject to broader tribal powers.

[35] *See*, *e.g.*, Indian Country U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 976 (10th Cir. 1987) (analyzing one parcel of land held by the Creek Nation and finding that, "with title dating back to treaties concluded in the 1830s and patents issued in the 1850s," such land is the "purest form of Indian Country.")

original allottee and for which "title … can be traced directly to the Reservation(s) granted to [a Tribe] … and [that were] never owned by the State of Oklahoma,"[36] and lands that have passed entirely out of tribal or tribal citizen ownership.[37]

The loss of tribal- and tribal member-owned lands was compounded after allotment by additional Congressional legislation addressing the alienability of individual allotments or parcels of restricted fee lands and expanding Oklahoma's authority over the transfer and management of those parcels.[38] The Stigler Act of 1947, for example, limited who could acquire such interests,[39] authorized state court jurisdiction over guardianship, estate, and probate proceedings for members of the Five Tribes,[40] and limited the tax exempt status of those lands.[41] Each of these actions terminated otherwise applicable federal law protections for those interests and, as a result, trust and restricted allotments continued to pass from tribal hands into non-Indian ownership.[42] In addition, as discussed in greater detail below, the Stigler Act also authorized state regulatory authority over oil and gas operations on the Tribes' restricted lands, although such authority did not explicitly displace any concurrent tribal powers and remained subject to federal oversight.[43]

Finally, even more recent federal legislation focused on the balance of federal, tribal, and state authorities within the boundaries of Oklahoma may also be relevant. In 2005, for example, Congress required the USEPA to approve an extension of the State's regulatory programs into Indian Country upon Oklahoma's request and required the State's agreement as a precondition to the assumption of such responsibilities by any Tribe.[44] As a result of this provision, unlike elsewhere in Indian Country, the Five Tribes must reach agreement with Oklahoma in order to be delegated federal authority from USEPA.[45] In addition, by virtue of recent, post-*McGirt* approval from the USEPA Administrator pursuant to this law, Oklahoma

[36] *See*, *e.g.*, *Findings of Fact and Conclusions of Law*, 6, Bosse v. State of Oklahoma, Case No. CF-2010-213; PCD-2019-124 (Mclain Cty. Dist. Ct. *filed* Oct. 13, 2020)
[37] *See also* D. Faith Olowski and Robbie Emory Burke, *Oklahoma Indian Titles*, 29 TULSA L. J. 361, 363-67 (2013).
[38] *See*, *e.g.*, Act of Aug. 4, 1947, 61 Stat. 731 (The Stigler Act).
[39] *Id.* at Sec. 1-2, 61 Stat. 731-32.
[40] *Id.* at Sec. 3, 61 Stat. 732.
[41] *Id.* at Sec. 6, 61 Stat. 733.
[42] Congress recently amended the law to eliminate the limitations on who could acquire trust and restricted allotments. *See* Act of Dec. 31, 2018, Pub. L. 115-399, 132 Stat. 5331.
[43] Act of Aug. 4, 1947, Sec. 11, 61 Stat. 731, 734 ("All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma; Provided, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.")
[44] The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Aug. 10, 2005, Sec. 10211, Pub. L. 109-59, 119 Stat. 1144, 1937.
[45] *Id.* at Sec. 10211(b)(2).

continues to exercise broad environmental regulatory authority across the Five Tribes' reservations.[46]

These examples are particularly relevant for the specific subject matter areas that follow but, more broadly, emphasize the need for careful scrutiny of the potential for unique legal issues related to the Five Tribes within the broader context of federal Indian law. With that approach in mind, the remainder of this paper focuses on environmental regulation, with a specific emphasis on oil and gas development; natural resources management, with a specific focus on hunting and fishing; and the management of water and water rights.

Environmental Regulation.

The authority to regulate and protect the environment within Indian Country is primarily governed by two intersecting and overarching legal tests. First, as described above, the general rules of civil regulatory authority authored by the decisions of the United States Supreme Court provide the basis for determining whether a tribal or state government can adopt and enforce environmental laws and regulations. Second, a suite of federal environmental protection laws authorize the USEPA or, if approved by the USEPA, either a tribe or state, to develop, implement, and enforce various environmental rules, including those related to air and water quality and a host of other issues.[47] These two primary standards for analyzing and assessing environmental regulatory authority in Indian Country are often fact-bound and complex, requiring an understanding of the specific parties, land, and activity over which such authority is being asserted. Therefore, this section addresses these issues by utilizing the specific example of oil and gas development in a post-*McGirt* eastern Oklahoma to help guide the discussion.

A. Oil and Gas Development in Indian Country and Oklahoma.

The regulation of oil and gas activity requires a host of interrelated or sequential actions, from spacing, pooling, and communitization rules and regulations to the enforcement of health and safety standards during development to the plugging and abandonment of previously developed wells. The protection and regulation of water

[46] Letter from USEPA Administrator Wheeler to Governor J. Kevin Stitt, Re: Approval of State of Oklahoma Request Under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (Oct. 1, 2020), *available at* https://turtletalk.files.wordpress.com/2020/10/epa-letter-to-gov.-stitt.pdf [hereinafter Wheeler letter].

[47] *See Tribal Assumption of Federal Laws – Treatment as a State (TAS)*, *supra* n. 18.

and air quality from discharges or pollution during such development are also critical elements of such authority.[48]

In most instances across Indian Country, the federal government plays an integral role in these activities by virtue of its trust responsibility and ownership (for the benefit of tribes) of significant surface and mineral interests. Under federal law, therefore, various federal agencies are responsible for the leasing, regulation, and oversight of oil and gas development on such lands.[49] In addition, many tribes on whose reservations oil and gas development is prevalent have adopted their own legal and regulatory structure to support those federal agencies, whether through tribal regulatory processes necessary prior to the federal approval of a lease or other decision or tribal codes addressing other related environmental protections.[50] A number of tribes, including the Cherokee Nation, have also sought the delegation of additional authority from the USEPA under various federal environmental laws authorizing such delegations.[51] The combination of federal and tribal oversight of oil and gas development along with tribal environmental laws and protections, including those relying on delegated federal authority, provide a broad basis of federal and tribal regulatory authority on many reservations.

Conversely, prior to *McGirt*, the State of Oklahoma exercised authority over the bulk of these activities across all of eastern Oklahoma. For example, pursuant to the Stigler Act described above, the Oklahoma Corporation Commission exercised concurrent authority over the leasing, spacing, communitization, and decommissioning of wells on certain restricted lands within the Five Tribes' reservations.[52] As noted by the text of that law, the exercise of that authority is in conjunction with the federal government's authority, and the federal government retains leasing and regulatory authority over those and other restricted or trust lands of the Five Tribes as well.[53]

[48] Although oil and gas development is a discrete example intended to illustrate and apply the broader concepts relevant to environmental regulation, the potential environmental impacts occasioned by such development could be extrapolated to other activities. Also, this briefing paper does not consider the authority to levy taxes on oil and gas activity, which is addressed in a separate briefing paper in this series.

[49] *See*, *e.g.*, 25 C.F.R part 211 (2020).

[50] *See*, *e.g.*, *MHA Energy*, MANDAN, HIDATSA AND ARIKARA NATION, https://www.mhanation.com/mha-energy (last visited Nov. 27, 2020); *Southern Ute Department of Energy*, SOUTHERN UTE INDIAN TRIBE, www.suitdoe.com (last visited Dec. 1, 2020).

[51] *Tribes Approved for Treatment as a State (TAS)*, UNITED STATES ENVTL. PROTECTION AGENCY, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (last visited Dec. 1, 2020).

[52] Act of Aug. 4, 1947, 61 Stat. at 734; Currey v. Corp. Comm'n, 617 P.2d 177 (Okla. 1979), *cert den.* 452 U.S. 938, *reh. den.* 453 U.S. 927 (1981) (upholding state authority to order the plugging of wells on restricted lands).

[53] *See*, *e.g.*, *Leasing of Restricted Lands of Members of Five Civilized Tribes, Oklahoma, For Mining*, 25 C.F.R. Part 213 (2020).

In addition, in 2013, the Muscogee Creek Nation—expressing a desire to improve upon the federal government's regulatory activities—adopted its own tribal law to regulate oil and gas activities as well.[54] Other of the Five Tribes have also adopted their own environmental laws and developed environmental programs in an effort to protect their trust and restricted resources as well as their citizens and communities.[55]

But, despite those potentially concurrent federal and tribal standards, the Oklahoma Corporation Commission has been the primary regulator of oil and gas activity within the Five Tribes' reservations, even to the detriment of the federal government's regulatory authority.[56] In addition, since the USEPA Administrator's approval of Oklahoma's petition to extend its delegated environmental authority into the Five Tribes' reservation boundaries after *McGirt*, the State continues to exercise environmental regulatory authority on essentially the same basis as it did prior to that decision.[57]

So, what opportunities for reform or improvement are presented by a post-*McGirt* world?

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[54] Muscogee (Creek) Nation N.C.A. 13-266, *available at* https://www.creeksupremecourt.com/wp-content/uploads/T43-NCA13-266.pdf (last visited Dec. 1, 2020).

[55] *See*, *e.g.*, *Cherokee Nation Environmental Programs*, CHEROKEE NATION, https://www.cherokee.org/our-government/secretary-of-natural-resources-office/environmental-programs/ (last visited Nov. 27, 2020).

[56] *See*, *e.g.*, Owen L. Anderson, *Pooling, Communitization & Unit Formation: State Conservation Regulation – Single Well Spacing and Pooling – vis a vis Federal and Indian Lands*, Appx. A, 2006 NO. 4 RMMLF-INST PAPER NO. 2 ("The OCC [Oklahoma Corporation Commission] has not been delegated authority to regulate oil and gas development on the trust allotted lands or to apply the conservation laws to such lands. Thus, exclusive regulatory authority exists within BLM and BIA for the trust allotments. However, in practice, due to the mixed ownership of non-Indian and Indian lands in trust allotments in Oklahoma, the OCC routinely establishes drilling and spacing units that either include or de-space Indian trust lands, regardless of whether the Indian lands have been leased by the Department.")

[57] *See* Wheeler Letter, *supra* n. 46; United States Environmental Protection Agency, *Summary Report of Tribal Consultation and Engagement Related to the State of Oklahoma's Request to Implement Regulatory Programs in Certain Areas of Indian Country in Accordance with Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA)*, 9 (Sept. 29, 2020) ("Generally speaking, following approval of the State's request, the geographic and programmatic scope of Oklahoma's regulatory programs will not change from that which existed, as a practical matter, prior to the McGirt decision…In addition, EPA's approval is not intended to affect any authority that a tribe or EPA may have on Tribal Trust lands, allotments, or treaty fee lands. Nor is EPA's approval intended to address any aspect of any tribe's authority based on tribal law outside the scope of any statute administered by EPA. EPA's decision under SAFETEA will generally not affect EPA's direct implementation of programs on trust lands, allotments, and treaty fee lands.")

B. Post-*McGirt* Opportunities and Risks.

As described above, Indian tribes retain broad power over their lands and members within Indian Country and assertions of state power over tribes, their lands or members within Indian Country are, as a general matter, *per se* invalid unless authorized by Congress.[58] Therefore, with the Supreme Court's recognition that the Five Tribes' reservation boundaries remain, this broad tribal authority and exclusion of state authority extends to those boundaries, and includes tribal power over members who may be engaging in activities on non-Indian owned lands.

Beyond the activities of tribal members, the Supreme Court's *Montana* test, including its general rule and two exceptions, has become the guiding legal principle for determining whether one of the Five Tribes can exercise regulatory control over non-tribal members on non-Indian owned lands in Indian Country. But, by virtue of the unique history of Oklahoma, including the various Congressional enactments related to tribal lands, allotments, and restricted status lands, even determining the nature of ownership of a particular parcel may be challenging. Unlike in *Montana*, where the Supreme Court determined that the Crow Tribe lacked any claim to the lands at issue, the Five Tribes retain treaty-guaranteed lands—the "purest form of Indian Country"[59]—and could potentially assert broader authority, conditioned on the continuing right to exclude state oversight, over other lands where title has remained in tribal member ownership and could be traced directly to those original treaty promises.[60] Thus, application of *Montana*'s general rule limiting tribal authority is not as straightforward in Oklahoma.

On non-member owned fee lands, however, *Montana*'s general rule does apply and tribal authority over a non-member on non-Indian lands is generally disfavored. In those situations, a tribe must be able to show a consensual relationship with the non-member or that the non-member's activities pose a threat or may have an effect on the tribe's interests, health, safety, or welfare in order to exercise regulatory authority.[61] The nature of oil and gas development and its corresponding environmental risks would seem to provide a strong basis for tribal authority under this second *Montana* exception; however, while some lower courts have been open to such claims,[62] the Supreme Court has interpreted that exception very narrowly and suggested that only a catastrophic threat or effect would suffice.[63] Even if able

[58] McClanahan, 411 U.S. at 168; California v. Cabazon Band of Mission Indians, 480 U.S. at 214-15; *but see* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 483 (1976) (upholding as a "minimal burden" a state requirement that Tribes collect taxes from sales to non-Indians).

[59] Indian Country U.S.A., Inc. v. Oklahoma, 829 F.2d at 976.

[60] *Cf*. Montana, 450 U.S. at 561 (addressing the alienation of lands from tribal ownership to non-member fee ownership).

[61] Montana, 490 U.S. at 565-66.

[62] *See*, *e.g.*, FMC v. Shoshone-Bannock Tribes, 942 F.3d 916 (9th Cir. 2019); Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d 927, 939 (8th Cir. 2010)

[63] Plains Commerce, 544 U.S. at 341.

to meet that high standard, doing so would depend upon the specific facts at issue and likely not provide a broader base of authority necessary for tribal regulatory authority across all similarly situated actors within the reservation.

Conversely, although Congress has expressly authorized Oklahoma's authority over certain oil and gas and environmental regulatory activities, the State may still need to demonstrate that its authority to regulate elsewhere in Indian Country does not infringe upon tribal sovereignty and is not pre-empted under the applicable interest analysis described above.[64] As in the Supreme Court's analysis of these factors in its *Cotton Petroleum* and *Mescalero Apache Tribe* decisions, the outcome would likely turn upon the nature of the state's interests in exercising that authority and whether such state authority would frustrate competing federal and tribal interests. In *Cotton Petroleum*, for example, the Court found it persuasive that the State of New Mexico was directly involved in and supportive of non-Indian oil and gas development activity in Indian Country.[65]

While impossible to predict the outcome of any specific conflict, it seems likely that similar reasoning would be quite persuasive in any dispute over Oklahoma's regulatory authority over non-Indians on non-Indian owned land within the Five Tribes' reservations, particularly given the history of Oklahoma's extensive involvement in environmental regulation and oversight of oil and gas activity and Congressional expansions of that authority in the Stigler Act and SAFETEA-LU. As with arguments around tribal authority under *Montana*, however, these cases and their resolution may be limited to specific facts and circumstances without providing many broad, reliable answers to either the Five Tribes or the State of Oklahoma.[66] In fact, where any such conflict may arise, the specific history, chain of title, and ownership of each parcel of land involved as well as the identity of the parties at issue are likely to determine the specific boundaries of tribal and state authority. Even where those boundaries are clearly defined in favor of state or tribal authority in a specific instance, however, both sovereigns are likely to share authority on a more regional or reservation-wide basis. And, even if the State or a tribe may have strong

[64] *See*, *e.g.*, COHEN'S HANDBOOK, at § 6.03[2][c], 528-29 ("State jurisdiction and tribal jurisdiction in Indian country raise two separate legal questions. For example, if application of the *Montana* test results in a finding that a tribe lacks jurisdiction over a non-Indian on non-Indian land in Indian country, it does not necessarily follow that the state can enter Indian country and impose its laws by … controlling the non-Indian behavior.")

[65] 490 U.S. 163, 185-87 ("This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it.")

[66] At least one producer has already challenged the OCC's authority over its operations within Indian Country. *See Decision Sheet of the ALJ*, Applicant Calyx Energy III, LLC, Cause Nos. CD 202001032 through 202001042, Before the Oklahoma Corporation Commission (Aug. 4, 2020). On November 25, 2020, the OCC, relying on the Stigler Act and the general rule of *Montana*, rejected that challenge. *Order Denying Protestant's Motion to Dismiss for Lack of Jurisdiction and Oral Motion to Stay*, Applicant Calyx Energy III, LLC, Cause Nos. CD 202001032 through 202001042, Before the Oklahoma Corporation Commission (Nov. 25, 2020), *available at* http://imaging.occeweb.com/AP/Orders/occ30376948.pdf.

arguments in its favor, the uncertainty, cost, and delay associated with securing a confirmation of such authority present a dilemma for policy-makers and regulators.

Faced with similar dilemmas and interested in avoiding all-or-nothing jurisdictional fights, other tribes have developed innovative approaches to oil and gas and environmental regulation within their reservation boundaries. On the Southern Ute Indian Reservation in Southwestern Colorado, for example, the jurisdictional situation is similarly complicated by history, allotment, and conflict between the Tribe and the State of Colorado. But, in hopes of providing some certainty and avoiding protracted litigation and uncertainty, the Tribe and its allies persuaded Congress to enact a law confirming some of the jurisdictional divides within the Reservation's boundaries.[67]

While that legislation limited tribal jurisdiction over non-Indians to the Tribe's trust lands,[68] it did not resolve the complex situation of state, federal, and tribal regulation of the development of oil and gas from the various parcels of surface and sub-surface interests within the Reservation. In an effort to establish guidelines between those three governments for those regulatory activities, the Tribe, the federal government, and the State oil and gas regulatory body negotiated and entered an intergovernmental agreement pursuant to which the parties agreed to disagree about the extent of their respective authorities but consented to a process for acknowledging and confirming appropriately rendered decisions of the relevant state regulatory body.[69] Similar intergovernmental agreements address the balance of regulatory authority on Indian lands and provide a common basis for communication while reducing potentially duplicative regulatory requirements,[70] an issue already identified as an existing challenge for certain restricted status lands in

[67] Pub. L. 98-290, 98 Stat. 201 (May 21, 1984), *codified at* 25 U.S.C. § 668 notes.
[68] *Id.*
[69] See Section D.4, INTERAGENCY MEMORANDUM OF UNDERSTANDING (Southern Ute Indian Tribe and Bureau of Land Management) AND INTERAGENCY AGREEMENT (Bureau of Indian Affairs and Bureau of Land Management) attached to Anderson, *supra* n. 56 at Appx. C ("It is the Tribe's position that the COGCC lacks the jurisdiction to issue an order or decision affecting Indian lands within the boundaries of the Southern Ute Indian Reservation. Pursuant to an MOU between the BLM and the COGCC, BLM has contracted with the state to conduct hearings and review matters affecting Indian lands, and to make decisions affecting Indian lands. Without the concurrence of the parties hereto to decisions rendered by the COGCC affecting Indian lands, the parties agree that the COGCC by itself lacks the jurisdiction to render such decisions. This Agreement is intended to provide an acceptable procedure for obtaining the concurrence of the parties needed to make any COGCC decision binding. Should the COGCC render a decision or order after the parties have followed the approved procedures contained in this Agreement, said COGCC decision shall be deemed by the parties hereto to be a decision of the BLM. Any interested party shall have the same opportunity to appeal or challenge such decision as if said decision had been rendered exclusively by the BLM, Colorado State Director.")
[70] *See*, *e.g.*, Anderson, *supra* n. 56 at Appx. C (compiling MOUs).

eastern Oklahoma.[71] With that common basis, then, the Southern Ute Indian Tribe worked to develop its own regulatory capacity and authority to complement that of its fellow governmental partners.[72]

In addition, facing similar potential for conflicts and litigation, the Southern Ute Indian Tribe also developed an innovative approach to environmental regulation. Working with the State of Colorado, the Tribe "established a six-member environmental commission to promulgate rules and regulation for reservation air quality."[73] The intergovernmental agreement to do so envisioned a long-term collaborative effort to build an air quality program to cover the entire Reservation and, ultimately, resulted in the Tribe applying for and being granted authority from the USEPA to administer and regulate air quality, subject to the oversight and authority of the intergovernmental environmental commission.[74] As a result, while the process of establishing the commission and developing its technical capacity has taken decades, both the Tribe and the State of Colorado are now able to work cooperatively to protect the local environment for all of their citizens.

The Gila River Indian Community (GRIC) in Arizona is another example of tribal efforts to regulate the environment despite jurisdictional complexities. Like Southern Ute, the GRIC worked to develop a comprehensive air quality management plan and engaged in a long-term effort to educate and consult with neighboring communities and non-tribal reservation residents about the GRIC's plan and efforts to protect air quality.[75] The GRIC also secured treatment-as-state status from USEPA but did not initially have confirmed authority to levy penalties and enforce them upon non-tribal operators on the reservation. Nonetheless, the GRIC's educational and collaborative efforts preempted any jurisdictional challenges to those early enforcement activities.[76]

The lessons offered by Southern Ute and GRIC demonstrate the potential benefits of long-term cooperative efforts to regulate the environment, particularly for resources

[71] *See id.* at Appx. A ("…companies have advised the BLM that they believe development of Indian trust lands in Oklahoma is cost prohibitive because of dual permitting requirements imposed by the BLM and OCC.")
[72] *See Southern Ute Department of Energy*, *supra* n. 50.
[73] Sarah L. Hicks, *Intergovernmental Relationships: Expressions of Tribal Sovereignty* in Rebuilding Native Nations: Strategies for Governance and Development, 248 (Miriam Jorgensen, ed. 2007); *see also* https://www.southernute-nsn.gov/wp-content/uploads/sites/15/2018/04/Intergovernmental-Agreement_IGA.pdf.
[74] *See* 76 Fed. Reg. 12,925 (Mar. 9, 2011).
[75] The Harvard Project on American Indian Economic Development, *HONORING NATIONS: 2010 Honoree; Air Quality Program – Gila River Indian Community*, 2-3, https://hpaied.org/sites/default/files/publications/air%20quality%20program.pdf.
[76] *Id.* at 3 ("Although formal federal enforceability was still pending at the time of these sanctions, there were no legal challenges to the community's air quality enforcement authority. This acceptance is a tribute to the tribal government's openness to working with stakeholders, as well as its willingness to cooperate with other governments, and to develop regulations consistent with the federal Clean Air Act.")

that could result in permanent impacts across jurisdictional boundaries, like oil and gas development and air and water quality. While the possibility of negotiating and entering cooperative agreements to address oil and gas or broader environmental regulations presents a daunting challenge, the fact-specific and limited nature of Supreme Court precedent and potential litigation may result in similar delays while still resulting in continued uncertainty.

Natural Resources (Hunting and Fishing)

The complexities associated with environmental regulation mirror those relevant to the management of natural resources more broadly, including the conservation of fish and wildlife and the control of hunting and fishing in Indian Country. As with the analyses of state and tribal authority described in the previous section, tribes generally retain broad authority over their members and resources while the *Montana* test governs tribal authority over non-tribal members on non-Indian owned lands. Similarly, as demonstrated by *New Mexico v. Mescalero Apache Tribe*,[77] state authority over non-Indian hunting and fishing within Indian Country is analyzed by applying the preemption framework.[78] Thus, post-*McGirt*, tribal authority over tribal members now extends to the exterior boundaries of the Five Tribes' Reservations and, if litigated, the legal standards for determining tribal or state authority over non-tribal members on non-Indian owned lands within those boundaries depend upon facts and contexts specific to individuals and lands involved. Therefore, as with tribal authority to regulate the environment, the prevailing narrow view of tribal authority over non-tribal members combined with the long history of state control over much of this territory may undermine efforts of the Five Tribes to secure judicial affirmation of their inherent sovereign power to regulate the use of natural resources by any user anywhere within their Reservations.[79]

Prior to *McGirt*, the Cherokee and Choctaw Nations developed intergovernmental agreements with the State of Oklahoma to provide a basis on which the citizens of each Nation could secure hunting and fishing licenses and upon which each Nation could work cooperatively with Oklahoma to "effectively manage their respective and

[77] 462 U.S. 324 (1983).

[78] *See*, *e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[79] The Muscogee (Creek) Nation noted these limitations in its amicus briefing to the Supreme Court in both *McGirt* and its predecessor case. *See* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, McGirt v. Oklahoma, No. 18-9526, 43 (filed Feb. 11, 2020) ("This Court's precedents render hollow any claims of civil legal disruption as they presumptively constrain the exercise of tribal authority over non-Indians on fee lands (in areas ranging from regulation to taxation to adjudication) while providing that the corollary state authority remains intact."); Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, Carpenter v. Murphy, No. 17-1107, 31-34 (Sept. 26, 2018).

shared resources."[80] While the specific terms and implementation of each of those compacts differ slightly, both seek to ensure a comprehensive legal and regulatory scheme for tribal citizens to hunt and fish while recognizing the unique history and jurisdictional complexities of the Cherokee and Choctaw lands and reservations. The tribal nations agreed in both compacts to purchase state licenses for their citizens and to enact legislation consistent with relevant federal laws and comparable to Oklahoma's hunting and fishing standards in order to maintain consistency and comprehensive protections for fish and wildlife.[81]

Importantly, both Compacts include broad definitions of tribal authority. The Cherokee Nation's Compact generally refers to "to the lands, waters, fish, wildlife and persons subject to the jurisdiction of the Nation,"[82] while the Choctaw Nation's Compact also specifically defines those lands as "including those lands defined as 'Indian country' per 18 U.S.C. § 1151."[83] Thus, post-*McGirt*, the tribal nations and Oklahoma could continue to rely upon the terms of these compacts to govern the regulation of hunting and fishing for tribal citizens anywhere within the exterior boundaries of the Cherokee and Choctaw Reservations without the need for further amendment or modification.

But, while these Compacts provide a solid foundation on which to proceed, both Cherokee and Choctaw—as well as other of the Five Tribes—may wish to revisit the balance of tribal and state authority represented in those agreements in light of *McGirt*. At the very least, for example, the Five Tribes and Oklahoma may need to reconsider how to effectively regulate and oversee tribal citizens hunting and fishing within the exterior boundaries of the Five Tribes' reservations, particularly in light of the general rule limiting state power over tribes and their members in Indian Country. Beyond that issue, the Five Tribes and the State of Oklahoma may also want to consider the regulation of non-tribal members as well as their collective interests in the conservation and management of shared resources like fish and wildlife. If so, lessons and examples from elsewhere in Indian Country may be helpful for those discussions.

The Flathead Reservation of the Confederated Salish and Kootenai Tribes (CSKT) in Montana is highly checkerboarded and predominantly populated by non-tribal members owning fee property.[84] With regard to the regulation of hunting and

[80] Hunting and Fishing Compact between the Cherokee Nation and the State of Oklahoma, Art. 1 (May 29, 2015) *available at* https://www.sos.ok.gov/documents/filelog/90614.pdf [hereinafter Cherokee Compact]; *see also* Hunting and Fishing Compact between the Choctaw Nation and the State of Oklahoma (Aug. 31, 2016), *available at* https://www.sos.ok.gov/documents/filelog/91317.pdf [hereinafter Choctaw Compact].
[81] *See* Cherokee Compact, at Art. II; Choctaw Compact, at Art. II.
[82] Cherokee Compact, at Art. II(1)(b).
[83] Choctaw Compact, at Art. II(1)(a) n. 1.
[84] *See Land Status 2020*, Confederated Salish and Kootenai Tribes of the Flathead Reservation, https://csktribes.org/component/rsfiles/preview?path=NRD%252Fpublic_landstatusCSKT_8x11-March2020.pdf (last visited Nov. 29, 2020).

fishing, however, the CSKT retain important rights they reserved in the 1855 Treaty of Hellgate, which established the reservation, including the "exclusive right of taking fish in all streams running through or bordering said reservation."[85]

Despite that strong, treaty-based right to exclusivity, however, the CSKT and the State of Montana engaged in lengthy litigation over the nature and extent of the Tribes' right to regulate all hunting and fishing (by both tribal members and non-members) across the Flathead Reservation.[86] Based on this treaty language, however, the CSKT were able establish their ownership of submerged lands underlying an important lake on the Reservation and, from that basis of ownership, distinguish *Montana* and secure broader regulatory authority, even over non-tribal members.[87]

The Tribes then leveraged that authority into regulatory standards that they sought to apply across the Reservation and began negotiations with the State of Montana to secure an agreement for doing so.[88] Spurred on by additional litigation supporting the tribal position,[89] the State and the Tribes entered into an intergovernmental agreement regarding hunting and fishing on the Flathead Reservation.

The terms of the State-Tribal Cooperative Agreement Between The Confederated Salish and Kootenai Tribes of The Flathead Reservation and The State of Montana by and through the Department of Fish, Wildlife and Parks of The State of Montana provide for a joint state-tribal wildlife board, the purpose of which is to develop "cooperative management plans which include fishing and bird hunting regulations."[90] The board is composed of a mix of tribal and state representatives and has the authority to establish technical committees to develop and recommend

[85] The Treaty of Hellgate of July 16, 1855, 12 Stat. 975. The Treaty of Hellgate also expressly reserved to the Tribes significant rights beyond the boundaries of that reservation. *See id.* at art. III, 12 Stat. 976. Although the Five Tribes' treaties do not include similar express reservations, a detailed analysis of whether the Tribes retain other treaty-reserved off-reservation rights is beyond the scope of this briefing paper. *See*, *e.g.*, art. XII, Treaty with the Creek Indians, 14 Stat. 785, 790, June 14, 1866 (reaffirming all "treaty obligations" of the United States from treaties entered into with the Creek Nation prior to 1861).

[86] *See* Jason Williams, *Beyond Mere Ownership: How the Confederated Salish and Kootenai Tribes used Regulatory Control over Natural Resources to Establish a Viable Homeland*, 24 PUB. LAND & RESOURCES L. REV. 121, 124-33 (2004)

[87] *Id.* at 125-129; Confederated Salish & Kootenai Tribes v. Namen, 380 F. Supp. 452,(D. Mont. 1974); Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982).

[88] Williams, *supra* n. 86, at 131-32.

[89] Confederated Salish & Kootenai Tribes v. Montana, 750 F. Supp. 446 (D. Mont. 1990).

[90] State-Tribal Cooperative Agreement Between the Confederated Salish and Kootenai Tribes of The Flathead Reservation and the State of Montana by and through the Department of Fish, Wildlife and Parks of The State Of Montana, *available at* http://fwp.mt.gov/fwpDoc.html?id=46515 (this 2010 public review version was adopted and has been subsequently renewed).

regulatory approaches.[91] Once the joint board adopts proposed regulations, those proposals are forwarded to both the CKST Tribal Council and Montana Fish and Wildlife Commission for final approval and adoption.[92]

The agreement includes specifics regarding enforcement of duly adopted hunting and fishing regulations as well as licensing procedures for authorizing individuals to hunt and fish on the Flathead Reservation.[93] The enforcement procedures include cross-deputization of tribal and state wildlife officers and provide further opportunities for collaborative training and cross-jurisdictional support.[94] Those procedures dictate standards for uniform regulatory enforcement and require the citation of tribal members and any violations occurring on Indian lands into tribal court, while alleged violations committed by non-members on non-Indian lands are cited into state court.[95] Any revenues generated by either license fees or enforcement actions are then deposited with the CSKT and earmarked for their fish and wildlife conservation program.[96]

Importantly, neither the CSKT nor the State acknowledge any diminution of their regulatory authority; rather, the cooperative agreement represents a bilateral process for exercising shared authority while each party agrees to disagree about the precise scope of its power.[97] And, despite decades of litigation preceding the cooperative agreement, it remains a solid and practical basis for workable joint regulation of hunting and fishing across the Flathead Reservation.[98]

Beyond on-reservation hunting and fishing, a number of tribes also engage in the management of off-reservation, treaty-reserved rights and resources that also demand collaborative approaches with local states and the federal government. Of these, the longest standing and most well-established are intertribal coalitions organized to manage and conserve treaty-related resources in the Pacific Northwest and Great Lakes regions. In the latter, the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) successfully negotiated and implemented a comprehensive memorandum of understanding with the United States Forest Service in order to provide for tribal regulatory authority and management of tribal members exercising

[91] *Id.* at 2-3.
[92] *Id.* at 3.
[93] *Id.* at 4-6.
[94] *Id.* at 4.
[95] *Id.* at 5.
[96] *Id.* at 6.
[97] *See id.* at 2 ("Nothing in this agreement shall be deemed as a concession by either party as to the other party's jurisdictional claims or an admission of the same, or a waiver of the right to challenge such claims upon termination of the Agreement.")
[98] *See* Bernie Azure, *Flathead Reservation Fish and Wildlife Board hears updates from CSKT Fish and Game and AIS Program*, CHAR-KOOSTA NEWS (Feb. 26, 2020), http://www.charkoosta.com/news/flathead-reservation-fish-and-wildlife-board-hears-updates-from-cskt-fish-and-game-and-ais/article_b32ce5d0-58c0-11ea-92f0-274e8a136180.html

their treaty rights on federal lands.[99] While focused on the Tribes' relationship with the federal government, this agreement highlights the benefit of an inter-tribal approach to addressing the management of shared resources and, as with the CSKT-Montana cooperative agreement, demonstrates the potential to avoid or curtail lengthy litigation if the parties are interested in agreeing upon "shared principles and … clearly defined processes for joint decision-making and conflict resolution."[100]

Water and Water Rights.

Tribal water rights in Oklahoma pose a significant and unresolved issue that existed prior to and regardless of *McGirt*. In its 2012 Oklahoma Comprehensive Water Plan, for example, the Oklahoma Water Resources Board (OWRB) recommended that, in order "[t]o address uncertainties relating to the water rights claims by the Tribal Nations of Oklahoma and to effectively apply the prior appropriation doctrine in the fair apportionment of state waters, the Oklahoma Governor and State Legislature should establish a formal consultation process as outlined" by a comprehensive report on the tribal water rights issues compiled by Professor Lindsay Robertson of the University of Oklahoma College of Law.[101] The opening paragraph of that tribal issues report aptly summarizes the issues, which, despite the OWRB's 2012 recommendation, remain mostly unaddressed:

> As well- and long-recognized by the State of Oklahoma, the presence in the state of almost 40 federally-recognized tribal governments, some or all of which may have valid, federally-enforceable, treaty-based claims to water, has resulted in uncertainty with regard to issues relating to ownership of and jurisdiction over water within the State's geographic limits. These claims arise primarily from alleged reserved rights recognized in treaties between the tribes and the United States. Although no such rights have been judicially found to exist in Oklahoma, such rights have been recognized by federal

[99] *See*, *e.g.*, *The Harvard Project on American Indian Economic Development, HONORING NATIONS: 2000 Honoree; Treaty Rights/National Forest Memorandum of Understanding Tribes of the Great Lakes Indian Fish and Wildlife Commission*, https://hpaied.org/sites/default/files/publications/Treaty%20Rights%20National%20Forest%20Management%20MOU.pdf.

[100] *Id.* at 3; *see also* Columbia River Inter-Tribal Fish Commission, www.critfc.org; Brief of Amici Curiae Southern Ute Indian Tribe and Ute Mountain Ute Tribe in Support of Petitioner, Herrera v. Wyoming, No. 17-0532, 17-19 (filed Sept. 11, 2019) (detailing tribal-state intergovernmental agreements to facilitate the exercise of off-reservation treaty rights); *IBMP Partner Protocols*, Inter-Agency Bison Management Plan, http://ibmp.info/Library/PartnerProtocols/PartnerProtocols_190404.pdf (detailing terms of federal-state-tribal agreements regarding the management of bison in and around Yellowstone National Park).

[101] Oklahoma Water Resources Board, *Executive Report: 2012 Oklahoma Comprehensive Water Plan*, 13 (Feb. 2012), http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP%20Executive%20Rpt%20FINAL.pdf.

> courts in litigation in other states, and tribes in Oklahoma have expressed confidence that their federal treaties would similarly be found to incorporate reserved water rights. *Advocates for the Five Nations (the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, the Muscogee (Creek) Nation, and the Seminole Nation) have made the related argument that they have an even stronger claim based on treaty provisions granting those Nations their lands in fee simple.* Like the Oklahoma tribal reserved rights claims, this claim has not been fully litigated.[102]

Thus, while the formal recognition of the Five Tribes' reservation boundaries does not directly impact the existence of or strength of the Tribes' claims to water rights associated with the treaties that established those reservations in the first place, the resolution of those claims and the potential for expanded tribal management and protection of water resources could be considered in the context of other post-*McGirt* developments. In fact, the discussion and work to resolve these issues could form an important basis on which to work toward solutions in other areas that do result from *McGirt*. In that instance, the assessment and balance of tribal and state regulatory authority described in the preceding contexts of environmental and natural resource regulation will be useful; however, with regard to water resources, the basis for those authorities may differ because of the strong but yet unresolved treaty-based claims to water rights described by Professor Robertson. The existence and resolution of these claims will therefore likely require a slightly different approach than those pursued in other regulatory arenas.

The series of treaties through which the Five Tribes reserved lands in what is now Oklahoma provide the foundation for tribal claims to water and, as confirmed by the United States Supreme Court,[103] a basis on which the Five Tribes may assert ownership rights in lands underlying waterways traversing their reservations. Traditionally, tribal water rights are analyzed according *United States v. Winters*, a 1908 case in which the Supreme Court recognized that the federal government's setting aside of lands for tribal nations also effectuates the reservation of appurtenant water rights sufficient to fulfill the purposes of those reservations.[104] But, while recognizing those rights, the *Winters* decision left the details of their quantification, scope, and extent unaddressed.

The unique history of the Five Tribes' land is distinct from the issues resolved in *Winters*, primarily because the United States guaranteed to the Tribes their land in

[102] Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Supplemental Report: Tribal Issues & Recommendations*, *1 (Feb. 2011), http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP_TribalWater_IssuesRecs.pdf (emphasis added).
[103] Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).
[104] Winters v. United States, 207 U.S. 564 (1908).

fee status, never to become part of any state.[105] Therefore, the Tribes acquired not only implied rights to water under *Winters* but potentially actual ownership of all of the water as well.[106] This history flips the *Winters* analysis on its head because, as noted by Professor Taiawagi Helton, "the question is not, How much water was reserved in the tribes? but how much water has been taken away? …[a] shift [that] transfers the burden of establishing a right to water from the tribes to the state."[107]

The subsequent history of allotment and dispossession of those tribal lands may complicate the assessment of the Five Tribes rights to water but, if, as in *McGirt*,[108] that assessment relies on the foundational rules of federal Indian law such as requiring express Congressional action to divest tribes of their property and interests, these tribal rights remain valid.[109]

In addition to providing a solid basis for the Five Tribes' claims to water rights, the history of treaties and land ownership of the Five Tribes also supports broad tribal authority over the management and protection of those waters. As mentioned above, the United States Supreme Court confirmed tribal ownership of certain submerged lands underlying navigable waterways within their reservation boundaries in *Choctaw Nation v. Oklahoma*.[110] That ownership marks an additional critical distinction for the Five Tribes' rights as the United States Supreme Court relied on the ownership of similar submerged lands by the State of Montana to limit tribal regulatory authority over non-tribal members in those areas.[111] Therefore, in addition to ownership-based claims to water, the Five Tribes may also be able to assert broader sovereign control of those resources, including property-based rights to exclude or condition entry upon submerged lands.[112]

Notwithstanding the potential strength of these claims as a legal matter, however, successfully adjudicating and vindicating them may present significant challenges.

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[105] *See*, *e.g.*, Joel West Williams, *The Five Civilized Tribes' Treaty Rights to Water Quality and Mechanisms of Enforcement*, 25 N.Y.U. ENVT'L L. J. 269, 284-89 (2017).

[106] *See*, *id.* at 289 ("Accordingly, since the time the Five Civilized Tribes obtained fee title to the lands in the eastern portions of the Indian Territory until the present day, they have always retained water rights that are not subject to ownership or control of any other government."); Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L. J. 979, 995 (1998) (following these treaties, "[t]he tribes were the only possible owners of land in the region. There existed no other entity to which any property could go. Consequently, the tribes owned all of the land and the water in the Indian Territory. The water was reserved for their absolute and exclusive use.") (Citation omitted).

[107] *Id.*

[108] 140 S.Ct at 2462.

[109] *See*, *e.g.*, Helton, *supra* n. 106 at 995.

[110] 397 U.S. 620 (1970); *see also* United States v. Grand River Dam Auth., 363 U.S. 229 (1959).

[111] *Montana*, 450 U.S. at 555 n. 5 (distinguishing *Choctaw Nation*).

[112] *See*, *e.g.*, Williams, *supra* n. 105 at 290 ("the Five Civilized Tribes have more than a property right [in submerged lands], but also a sovereign right of governance.")

First, water resources in Oklahoma are limited to two main river basins and access to groundwater.[113] These limited sources increase the likelihood of competition for water resources, even among the Five Tribes, and demand a comprehensive and nuanced understanding of hydrology in order to identify existing claims, uses, and capacity. Given those limits, the State of Oklahoma is likely to assert various arguments in opposition to the assertion of broad tribal claims to water or water management.[114] While the 2012 Oklahoma Comprehensive Water Plan suggests a softening of potential State opposition to tribal claims, earlier plans relied on an outdated misunderstanding of the status of Indian reservations within the State's boundaries.[115] Similarly, the State initially stridently opposed efforts of the Chickasaw and Choctaw efforts to protect their water resources but, ultimately, the parties were able to reach a comprehensive settlement of those tribal claims.[116]

Furthermore, despite the legitimacy of tribal legal claims, the State's practical reliance upon existing uses and claims to water rights and water management may present further barriers to the Five Tribes actually securing the full extent of their claims. The United States Supreme Court seems particularly sensitive to these concerns,[117] however, in the context of federal and tribal reserved water rights, the federal government has also traditionally deferred to state policies, interests, and laws.[118] Therefore, in addition to adjudicating their legal claims to water, the Five Tribes may also consider non-litigated solutions to securing appropriate rights to water and water management. The following lessons and examples may be useful in those efforts.

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[113] *See*, *e.g.*, Kenneth V. Luza, *Stream Systems of Oklahoma*, OKLAHOMA GEOLOGIC SOCIETY, *available at* http://www.ogs.ou.edu/pubsscanned/EP9p12_14water.pdf (last visited Dec. 29, 2020).

[114] *See*, *e.g.*, Helton, *supra* n. 106 at 995-96 (noting that the State could assert claims to water based on its acquisition of lands from the Five Tribes and pursue a right of unified administration of all water rights within its borders).

[115] Oklahoma Water Resources Board, *1980 Oklahoma Comprehensive Water Plan*, 11 (April 1, 1980), *available at* http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/1980_OCWP/1980_OCWP_entire.pdf ("... it should be noted that no Indian reservations presently exist in Oklahoma, with those previously existing being substantially dissolved by allotment of lands in severalty during the period of time from 1891 through 1906.")

[116] *See* Stephen H. Greetham, *Water Planning, Tribal Voices, and Creative Approaches: Seeking New Paths Through Tribal-State Water Conflict by Collaboration on State Water Planning Efforts*, 58 NAT. RESOURCES J. 1, 43-44 (2018); *Water Unity Oklahoma*, https://www.waterunityok.com (last visited Nov. 30, 2020).

[117] *See*, *e.g.*, *McGirt*, 140 S.Ct. at 2481 ("Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law.")

[118] *See*, *e.g.*, McCarran Amendment, 43 U.S.C. § 666 (2016); U.S. v. New Mexico, 438 U.S. 696, 718 (1978) (Powell, J. concurring) ("I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law.")

Closest to home is the example offered by the 2016 settlement agreement regarding the Chickasaw and Choctaw Nations' efforts to protect the waters of their homelands. Through that agreement, each Nation was able to secure defined rights to access and use water and confirm the rights of individual tribal allottees to certain water resources as well.[119] In addition, the parties committed to greater involvement and collaboration on future water planning efforts in recognition of their shared interests in the region's resources.[120] To reach that agreement required some compromises, however, including the waiver by the United States and the Nations of their rights to assert certain claims regarding rights to water or water management.[121]

Similar settlement agreements abound across Indian Country and many tribes, states, and the United States have hammered out mutually beneficial resolutions of long-standing and conflicting claims to water resources.[122] Key to those arrangements has been a solid foundation on which each party can assert, assess, and negotiate its interests in the context of competing claims and priorities. As Professor Robertson noted in his 2011 recommendations, various models for such negotiations could be considered and he specifically mentioned the way in which these matters were negotiated in the State of Montana.[123] There, the State established a reserved water rights compact commission and charged it with identifying, negotiating, and resolving tribal and federal claims to reserved water rights.[124] The result has been the slow, but steady, securing of agreements with each of the Tribes in Montana as well as the resolution of claims by the United States.[125]

Of these, the most recent agreement is the compact entered into between the Confederated Salish and Kootenai Tribes (CSKT) and the State of Montana.[126] Like the Chickasaw and Choctaw Settlement, to secure agreement from Montana and the federal government, the CSKT waived their claims to extensive water rights in

[119] *See* Secs. 7 & 8, State of Oklahoma, Choctaw Nation of Oklahoma, Chickasaw Nation, City of Oklahoma City Water Settlement, 60-73 (August 2016), *available at* https://www.waterunityok.com/media/1075/agreement-160808.pdf.
[120] *Id.* at 73-74.
[121] *Id.* at 12-18.
[122] *See*, *e.g.*, COHEN'S HANDBOOK at § 19.05[2], 1247-48 (listing settlements).
[123] Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Supplemental Report: Tribal Issues & Recommendations*, *7-8 (Feb. 2011), http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP_TribalWater_IssuesRecs.pdf.
[124] *See*, *e.g.*, Mont. Code Ann. §§ 85-2-701, et seq. (2020).
[125] *See* Montana Dept. of Natural Resources and Conservation, *Approved Compacts*, http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/approved-compacts (last visited Dec. 29, 2020).
[126] *See* Montana Dept. of Natural Resources and Conservation, *Confederated Salish and Kootenai Tribes Compact*, http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact (last visited Nov. 30, 2020).

exchange for defined and certain water rights.[127] In addition, however, the CSKT compact also provides for unitary administration and management of on-reservation water rights by a joint tribal-state entity.[128] Like the tribal-state wildlife commission described above, this arrangement cements a critical platform for continuing tribal-state cooperation in the oversight and regulation of the water resources shared on the reservation by tribal and non-tribal citizens.

The Five Tribes may seek to pursue other approaches for asserting and protecting their water resources as well. Even where their rights to water have not yet been adjudicated or quantified, the Tribes may seek to exert broader legal and regulatory control over water management. The legal basis for claiming such control, rooted in tribal claims to ownership of both water and submerged lands and cemented by the treaty history described above, could provide a broader and stronger foundation than the limitations posed by the *Montana* framework.[129] Even then, however, there may still be important qualifying factors on such tribal authority. On the Colville Indian Reservation in Washington, for example, the Confederated Tribes there have secured judicial confirmation of their rights to water and the authority to regulate those resources.[130] The Tribes have adopted a tribal code governing permitting and use of those waters by all (tribal and non-tribal) citizens.[131]

Similarly, in August 2019, the Agua Caliente Band of Cahuilla Indians adopted a tribal ordinance governing the permitting and use of groundwater in order to protect and manage those precious resources.[132] The adoption of that tribal regulatory structure followed the Band's victory in securing the recognition of their reserved rights to groundwater and, in adopting the tribal ordinance, the Band sought to apply it broadly to anyone, tribal member or not, "producing or desiring to produce" groundwater appurtenant to the Band's Reservation.[133] In doing so, the Band

[127] *See* Montana Dept. of Natural Resources and Conservation, *Comparison: Adjudication of CSKT Claims vs. CSKT-MT Compact Rights* (Feb. 15, 2019), http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/docs/compact-summaries/cskt-summary-2019-02-15.pdf.

[128] Art. IV(I), Water Rights Water Rights Compact Entered into by The Confederated Salish and Kootenai Tribes of The Flathead Reservation, Montana, The State of Montana, and The United States Ratified, § 85-20-1901 Mont. Code Ann. (2019).

[129] *See* Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVT'L L. J. 195, 215 (2015) (noting that, even outside of the Five Tribes' reservations, "application of the *Montana* rule in the on-reservation water regulatory context is uncertain because waters subject to reserved rights are not equivalent to non-member fee lands.")

[130] *See id.* at 241 (2015).

[131] *Id.*

[132] Ord. No. 55, Agua Caliente Water Authority Ordinance, 1 (Aug. 6, 2019), *available at* https://www.acwaterauthority.org/documents/Ordinance-55-Tribal-Water-Authority.pdf; *see also* Agua Caliente Water Authority, https://www.acwaterauthority.org (last visited Nov. 30, 2020).

[133] Ord. No. 55, *supra* n. 132, at 3.

expressly found that non-members producing groundwater on the Reservation had consented and were therefore subject to the Band's regulatory jurisdiction.[134]

But, while these broad assertions of tribal regulatory authority over water resources may be rooted in reasonable application of relevant legal standards, Professor Robert T. Anderson cautions that, "Tribes in similar situations [to the Colville Tribes] will need to take seriously the need to accord some respect to state water-right-holders."[135] If prior conflicts over tribal resources and authority in Oklahoma are any indication, efforts by the Five Tribes to unilaterally assert broader regulatory power over water resources within their Reservations are likely to be countered by stiff opposition from the State and its allies. Therefore, another potential path forward is offered by Professor Robertson's recommendations to the OWRB, which were adopted in the 2012 Oklahoma Comprehensive Water Plan:

1. That the State determine who within state government has the authority to approve a process for negotiation of water rights issues with tribes, who within state government has the authority to conduct such negotiations, and what the approval process is once negotiations are complete.
2. That the State assemble a team fully authorized to meet with tribal representatives to devise a process for the discussion and resolution of tribal water rights claims.
3. That upon the determination of process, the State appoint a fully authorized negotiating team to begin discussions with tribal representatives.
4. That upon the conclusion of negotiations (either individual, group or otherwise, as determined by the process planners), the results be submitted for such State approval as is required.
5. That the State consider the implementation of regular consultation protocols.[136]

While those recommendations focus on actions that the State of Oklahoma should take to consider addressing the Five Tribes rights to water, pursuing the establishment of a solid state-tribal forum in which these (and other) issues could be effectively broached, addressed, and ideally resolved, may be an important next step for the Five Tribes to consider. While the *McGirt* decision is prompting such

[134] *Id.* at 2.

[135] Anderson, *supra* n. 129 at 241. Furthermore, the federal government may be reluctant to assist or support tribal regulatory efforts, particularly in light of the decades-long refusal of the Department of the Interior to approve tribal water codes (for those tribes organized under the Indian Reorganization Act or whose constitutions require federal approval of tribal codes). *See id.* at 224-25.

[136] Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Supplemental Report: Tribal Issues & Recommendations*, *7 (Feb. 2011), http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP_TribalWater_IssuesRecs.pdf.

discussion across a range of policy matters, issues of water rights and management present a unique opportunity in that they were identified well before *McGirt* was decided and there is already a record of some success in reaching a collaborative path forward.

Conclusion.

The leaders of the Five Tribes and other policy-makers in eastern Oklahoma are faced with a wide range of options for addressing the post-*McGirt* world. Each strategic decision will need to weigh the risks, costs, and benefits of these approaches, which may vary from strident, unilateral assertions of sovereign authority to a more passive maintenance of (mostly state-dominated) *status quo ante*. With regard to regulation and protection of the environment, natural resources, and water of the region, these policy-makers must wrestle with each of these challenges in a highly contentious context, made more difficult by the shared and transitory nature of those subjects. Hopefully, this briefing paper can help support and inform those decisions by providing useful background and context along with lessons and examples of how others addressed similar challenges in other settings.